

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

**AKIMA GLOBAL SERVICES, LLC/AKAL
SECURITY**

Employer

and

Case 03-RC-161373

BUFFALO DETENTION OFFICERS UNION

Petitioner

and

**CONTRACT OFFICERS UNITED
NEGOTIATING TEAM**

Intervenor

DECISION AND ORDER

Buffalo Federal Detention Facility (“BFDF”), located in Batavia, New York, is owned and operated by the U.S. Department of Homeland Security (“DHS”) and Immigration and Customs Enforcement (“ICE”). BFDF houses inmates before they are deported from the United States by ICE. ICE has contracted with Akima Global Services, LLC (“AGS”) to provide staff, including armed and unarmed detention officers, to BFDF. AGS has, in turn, contracted with Akal Security, Inc. (“Akal”) to provide armed BFDF detention officers.

Petitioner Buffalo Detention Officers Union seeks an election for a unit of “all full-time and part-time detention officers, including those performing armed/processing/transportation/detention duties,” excluding “all supervisors, support staff, maintenance, salaried staff who qualify as management under the [National Labor Relations] Act, and all other reports”.¹

¹ Intervenor Contract Officers United Negotiating Team has intervened, seeking to be included on the ballot should an election be directed.

The unit sought by the Petitioner includes unarmed detention officers who are directly employed by AGS and armed detention officers who are nominally employed by Akal. Therefore, the sole disputed issue addressed at the hearing was whether AGS and Akal are joint employers of the detention officers whom Petitioner seeks to represent. As explained below, I find that the BFDF armed detention officers are jointly employed by AGS and Akal. I find, however, that AGS is the sole employer of BFDF's unarmed detention officers. Consequently, the petitioned-for unit contains solely and jointly employed employees. Under *Oakwood Care Center*, 343 NLRB 659 (2004), a unit comprised of solely and jointly employed employees is a multiemployer unit and is statutorily permissible only with the parties' consent. Because neither AGS nor Akal has consented to bargaining with the other in a multiemployer unit, the petition must be dismissed.

I. Facts

Background

AGS became the prime contractor, and Akal the subcontractor, for BFDF on February 1, 2015. AGS's predecessor, Valley Metro Barbosa Group ("VMBG"), held the BFDF prime contract from 2010 until January 31, 2015. VMBG, as a single employer, had a collective-bargaining agreement with Service Employees International Union, Local 200 United ("SEIU"), for a unit comprised of all full-time and part-time non-supervisory detention officers, both armed and unarmed.²

² The effective dates of the VMBG-SEIU collective-bargaining agreement were December 1, 2012 to November 30, 2015.

Overview of BFDF

BFDF is currently staffed by approximately 195 non-supervisory detention officers: approximately 150 employed by AGS, who are unarmed, and 43 full-time and 2 part-time, employed by Akal, who are armed. Akal's armed officers perform functions that AGS's unarmed officers do not: patrolling the outer perimeter of the facility, manning the lobby, processing detainees in and out of the facility, transporting employees out of the facility (for, e.g., medical appointments or transfer elsewhere), and the intake and holding of the detainees' personal property. AGS's unarmed officers perform all other guard duties, including escorting detainees within the facility. The schedule for all BFDF detention officers is broken into three shifts: 8:00 a.m. to 4:00 p.m., 4:00 p.m. to 12:00 a.m., and 12:00 a.m. to 8:00 a.m.

Management Structure

Charles Mulé is prime contractor AGS's Project Manager, its highest ranking manager at BFDF. Mulé is the primary BFDF interface with ICE, and reports to Laura Mitchell, AGS's general manager at its corporate headquarters in Herndon, Virginia. Craig Trippany, AGS's Deputy Project Manager, reports to Mulé. Rick Zydel is AGS's Business Manager and its human resources manager at BFDF. AGS's next level supervisors are two captains and several lieutenants.

Patrick Devine is subcontractor Akal's highest ranking manager at BFDF, where his title is Deputy Project Manager; he reports to Joseph Watson, Akal's corporate director for activities for DHS. The AGS-Akal organizational chart shows Deputy Project Manager Devine under Project Manager Mulé. Devine, however, testified that he regularly consults with, but does not take direction from, Mulé. Although Devine speaks occasionally with the on-site ICE

representative, most Akal communication with ICE happens through AGS, i.e., Mulé. Devine is Akal's human resources representative at BFDF, in which capacity he reports to the human resources department at Akal's corporate headquarters in Espanola, New Mexico. Akal's next highest ranking supervisors are Transportation/Processing Lieutenants Steven Cinotti and Wayne Hirsch; they report to Devine, but also take direction from ICE officers in the facility's processing area.

The employee handbook for all BFDF detention officers is an AGS document (denominated AGS - C.18.2A), although it carries both the AGS and Akal logos. It describes the contractor-subcontractor relationship between AGS and Akal and states, "Regardless of company affiliation, all staff is accountable to the Project Manager [Mulé]. We are one team." The understanding that AGS and Akal work as "one team" was reflected repeatedly in testimony at the hearing.³

Employment Policies

The employee handbook is distributed to all AGS and Akal officers upon hiring. Aside from the one page description of the AGS-Akal contractor-subcontractor relationship, and the Akal logo, it is entirely an AGS document and Akal is never again mentioned. Thus, the introductory letter to employees at the front of the handbook says, "Welcome to Akima Global Services," and the "About the Company" section references only AGS. Under the section "Reports of Time Worked," it states that "Time worked ... generally means time actually spent

³ The record shows that, in a July 2015 memo sent by Akal lieutenant Wayne Hirsch to all processing/transport officers (i.e., Akal officers), Hirsch signed himself as "AGS Processing/Transportation Supervisor." Hirsch signed himself the same way in an August 2015 email to AKAL transport offices, a message that was cc'd to Mulé. No witness was able to explain why Hirsch had done that (Hirsch did not testify). The record also shows that for internal BFDF memos to Akal officers, Akal uses AGS letterhead; Akal in fact has no letterhead at BFDF. This is done with the knowledge and tacit approval of Mulé. Similarly, Akal uses an AGS vacation/leave form for Akal officers.

performing duties for AGS' benefit and with AGS authorization." The handbook covers such terms and conditions of employment as transfers, work hours and break hours, overtime, performance reviews, and corrective action.

In addition to the employee handbook, other employment policy documents for BFDF officers are authored by AGS, although they also carry both the AGS and Akal logos. They reflect the "one team" relationship between AGS and Akal, but one dominated by AGS. Thus, the Fitness for Duty Policy (AGS – C.2.8) states, "This policy applies to all AGS and Akal staff, hereinafter referred to as AGS team or AGS staff." It covers such terms and conditions of employment as pre-employment physical screening, physical requirements for the job, drug screening (pre-employment and randomly thereafter), and the circumstances under which an "AGS team" manager may refer an employee for a fitness for duty review. In addition, the Minimum Standards for Employee Conduct and Qualifications for Duty (AGS – 2.A) states that it "is applicable to all contractor staff employed by [AGS] and [Akal], hereinafter referred to as AGS, the AGS team, or the company." It contains, among other terms, a detailed table of the levels of discipline for various infractions, from written and verbal warnings through suspensions and final warnings and up to termination, broken out by first, second, and third offenses.

Subcontract

The subcontract⁴ between AGS and Akal provides, among other things, that AGS retains the right to terminate the subcontract "at [its] convenience"; must approve all overtime for Akal officers; may, at its sole discretion, remove an Akal officer from an assignment; and may direct Akal to remove an Akal officer entirely if AGS deems him or her unfit for duty. In addition, the

⁴ Joint Exhibit 1 is a draft version of the AGS/Akal subcontract. The parties stipulated at the hearing that this draft version was an accurate reflection of the AGS/Akal relationship for all matters pertinent to this case.

subcontract provides that “[Akal] personnel shall adhere to and be accountable to [AGS] employment policies, workplace procedures, disciplinary actions, and compensation plan as established for the BFDF contract. All Prime contract personnel requirements are incorporated by reference.”

For Akal, the subcontract provides, among other things, that “[Akal] Labor Relations leadership shall participate in Collective Bargaining Agreement (CBA) negotiations”; “[Akal] Human Resources leadership will participate in development and review of common workplace policies that will be applicable to all [AGS] and [Akal] employees”; and that Akal must make its employee’s personnel files available to AGS’s human resources manager “at any time” (although medical information is to be kept confidential).

The subcontract also provides that its terms “shall not be deemed or construed to create a joint venture, partnership or agency relationship between the Parties for any purpose,” and that “[a]ll personnel used by [Akal] shall be, and shall at all times remain, employees or agents of [Akal].”

Supervision

AGS and Akal supervisors (captains and lieutenants) are both present Monday through Friday during the 8:00 a.m. to 4:00 p.m. and 4:00 p.m. to 12:00 a.m. shifts. Only AGS supervisors are present – and thus provide all supervision to Akal as well as AGS officers – during the Monday through Friday 12:00 a.m. to 8:00 a.m. shift, and all day on Saturday and Sunday.

Prior to each shift, a pre-shift roll call and briefing, known as a “muster,” takes place for both AGS and Akal officers. Both AGS and Akal supervisors are present at and conduct the

briefings, although the majority of the time it is AGS lieutenants who hold the floor during the briefings. In the absence of Akal supervisors – during the 12:00 a.m. to 8:00 a.m. shift, and all day on Saturday and Sunday – AGS supervisors conduct the entire briefing.

In addition, expectedly, other matters pertaining to Akal officers that require supervisory attention during the regularly-scheduled times that Akal supervisors are not at the facility are handled by AGS supervisors. For instance, AGS supervisors approve overtime that comes up unexpectedly over the weekends for Akal officers, and in one instance an AGS lieutenant sent an Akal officer, for a drug test following the officer's auto accident at the facility. The officer failed the test and was later discharged by Akal.

The record shows that there are occasional instances in which AGS and Akal supervisors may direct each other's officers: during emergency "1010 incidents" – that is, when an officer is in trouble – an "all hands on deck" dynamic arises in which AGS and Akal supervisors may direct officers of the other company.⁵

Hiring

Virtually the entire complement of BFDF detention officers was previously employed at BFDF under the predecessor contractor VMBG, and was hired by AGS and Akal in late 2014 to early 2015. During that time, AGS and Akal held joint town-hall style meetings for the BFDF detention officers, at which each employer presented information about the upcoming transition

⁵ The record shows other instances of activity in which AGS and Akal officers coordinate to some degree. Approximately once a month the detention officers conduct 15-20 minute "shakedowns," wherein AGS officers escort detainees from their cells or dormitories and search the cell or dormitory, while Akal officers remain in the hall and frisk and wand the inmates. In addition, Akal officers will occasionally (about once or twice a week) fill in briefly for AGS officers escorting detainees around the facility when AGS is short-staffed. Similarly, AGS officers will occasionally (about 5 to 10 times a years) assist Akal officers in processing detainees in or out of the facility (by, e.g., frisking, removing chains and cuffs). However, the record does not indicate the extent to which AGS or Akal supervisors direct the other company's employees during this coordinated activity.

and conducted its own interviews. Beyond being present at the same events at which the interviews were conducted, there is no evidence that either AGS or Akal has had any role in hiring each other's current complement of BFDF detention officers.

Discipline

As noted above, the AGS-authored Minimum Standards for Employee Conduct and Qualifications for Duty contains a detailed table about the levels of discipline to which AGS and Akal employees are subject for various enumerated infractions.

While Akal is required to inform AGS when it disciplines or discharges any Akal officer, the testimony shows that this happens after Akal has already made its determination. However, as noted above, the record shows one instance in which an AGS supervisor was involved in disciplining an Akal officer – the instance in which AGS lieutenant sent an Akal officer for a drug test following an auto accident at the facility, which test later resulted in Akal discharging the officer.

The record also shows that in May 2015, Akal's Devine signed two written discipline forms given to two AGS officers (arising from the same incident) in the box marked "supervisor." (AGS's Trippany and Zydel were the other two to sign, as "manager" and "HR," respectively.) Devine testified that this is the only instance in which he signed discipline for an AGS officer, and that he merely did so as a witness, at Trippany's request, in the absence of Mulé. Other than this instance, there is no evidence that Akal has any role in disciplining AGS officers.

Scheduling

As noted above, all BFDF detention officers work one of three shifts: 8:00 a.m. to 4:00 p.m., 4:00 p.m. to 12:00 a.m., and 12:00 a.m. to 8:00 a.m.⁶ Detention officers rebid for schedules and posts every four months, and selections are made on the basis of seniority. AGS and Akal officers, however, bid separately and do not bid on each other's posts (i.e., job assignments).

Overtime

As noted above, AGS must approve Akal officers' overtime hours. A "wheel" system is used to assign overtime among all officers on a rotating basis. The order in which officers are initially assigned to the wheel is determined by seniority. Again, AGS and Akal officers are not assigned to work each other's posts.

Wages

As noted above, the AGS/Akal subcontract provides that Akal employees are subject to the "compensation plan as established for the BFDF [prime] contract." Further, the employee handbook states that "overtime is paid in accordance with [Service Contract Act] determinations or the applicable collective bargaining agreement."⁷

Training

All BFDF detention officers are required by the American Corrections Association ("ACA"), the facility's accrediting body, to annually attend 40 hours of refresher training. These

⁶ There was testimony at the hearing that this schedule has been carried over from previous BFDF contracts. The VMBG-SEIU collective-bargaining agreement, however, contains shifts that are slightly different.

⁷ The subject of wages was not addressed at the hearing, other than AGS and Akal asserting that the Service Contract Act prevented them from altering the wages from the predecessor VMBG-SEIU collective-bargaining agreement.

training sessions are run regularly throughout the year, and are attended jointly by AGS and Akal officers. Teaching is provided by AGS and Akal officers (not supervisors).

Uniforms and Dress Code

Akal officers wear a holster and pistol. AGS officers do not. In all other respects, AGS uniforms and Akal uniforms are identical, including the shoulder patch which contains a large AGS logo with AGS's name above it and Akal's name below it. The BFDF officers' dress code is an AGS document, but testimony reveals that it is equally applied to Akal officers.

II. The Position of the Parties

Petitioner asserts that AGS and Akal are joint employers of the armed and unarmed detention officers whom it seeks to represent. It points to the integrated nature of the AGS and Akal detention officers' work and the companies' employment policies. Petitioner also relies on the extent to which AGS controls Akal's employees terms and conditions of employment through the terms of the subcontract, and through those employment policies that AGS has authored and to which Akal is subject.

AGS and Akal, by contrast, argue that they are not joint employers of the detention officers. They argue that there is no common law employment relationship between the Akal employees and AGS or between the AGS employees and Akal. AGS and Akal also assert that the terms and conditions of employment reflected in the subcontract and employment policies have been largely dictated by the government agencies to which the prime contract for BFDF is subject: DHS, ICE, and the ACA. In addition, they point to the Service Contract Act section 4(c) (47 USCA § 6707(c)), which they argue requires them to maintain the wages and fringe benefits of the predecessor collective-bargaining agreement.

At the hearing, the parties stipulated that, should I find that the detention officers are jointly employed by AGS and Akal, the petitioned-for unit of armed and unarmed officers is an appropriate unit.⁸

III. Analysis

A. Board Law

In *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), the Board reaffirmed that two or more employers are joint employers of the same employees if (1) they are “both employers [of a single workforce] within the meaning of the common law” and (2) they “share or codetermine those matters governing the [employees’] essential terms and conditions of employment.” 362 NLRB No. 186, slip op. at 15. The Board determines if a common law employment relationship exists by examining whether the employees perform services for the putative employer and are subject to the putative employer’s control or right to control how those services are conducted. *Id.*, slip op. at 12-17, 18 n.96. If the common-law test is satisfied, the Board then determines whether the putative employer “possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective-bargaining.” *Id.*, slip op. at 2. In this regard, the Board held that it would no longer require that a joint employer both *possess* the authority to control employees’ terms and conditions of employment and *exercise* that authority directly, immediately, and “not in a ‘limited and routine’ manner.” *Id.*, slip op. at 15-16 (overruling Board decisions, including *TLI, Inc.*, 271 NLRB 798 (1984), *enfd. mem. sub nom. Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985) and *Laerco Transportation*, 269 NLRB 324 (1984)). Rather, the Board concluded, it would also find

⁸ In post-hearing submissions, AGS and Akal clarified that the stipulation was not consent to multiemployer bargaining. I note that such a stipulation would be appropriate if AGS and Akal jointly employed the entire unit of employees.

joint employer status where the putative employer has the *right* to control, in the common-law sense, “the means or manner of employees’ work and terms of employment,” or actually exercises such control, “either directly or [indirectly] through an intermediary.” *Id.*, slip op. at 2, 3-6, 15-16, 18-20.

The Board directs that the initial inquiry into the common-law employment relationship look to the language of the *Restatement (Second) of Agency* (1958). *Id.*, slip op. at 12. The Restatement provides that:

A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

Restatement (Second) of Agency § 220(1).

Regarding the second part of the inquiry, the Board uses an “inclusive approach in defining ‘essential terms and conditions of employment.’” *Browning Ferris*, 362 NLRB No. 186, slip op. at 15. Such terms and conditions will include “‘matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction,’ a nonexhaustive list of bargaining subjects.” *Ibid.* (emphasis in the original). “Other examples of control over mandatory terms and conditions of employment found probative by the Board include ... overtime ... and determining the manner and method of work performance.” *Ibid.* (footnote omitted). Also probative of a level of control that would support a joint employer finding is the ability to terminate a contract at will. *Id.*, slip op. at 18 (citing *Value Village*, 161 NLRB 603, 607 (1966) and *Mobil Oil Corp.*, 219 NLRB 511, 516 (1975), *enft. denied on other grounds*, *Alaska Roughnecks & Drillers Ass'n v. NLRB*, 555 F.2d 732 (9th Cir. 1977)). However, if a putative employer’s control over terms and conditions of employment is too limited in scope or

significance to permit meaningful collective bargaining, the Board stated that it may decline to find a joint employer relationship. *Id.*, slip op. at 16.

The Board has also held that “combined units of solely and jointly employed employees are multiemployer units and are statutorily permissible only with the parties’ consent.” *Oakwood Care Center*, 343 NLRB 659, 663 (2004).

B. Application of Board Law to the Facts

1. AGS as Joint Employer

Under the facts recited above, I find that the Akal’s armed detention officers are jointly employed by Akal and AGS. First, the subcontractor Akal’s officers are in a common-law employment relationship with prime contractor AGS – that is, they are “employed to perform services in the affairs of [AGS] and who with respect to the physical conduct in the performance of the services is subject to [AGS’s] control or right to control.” *Restatement (Second) of Agency* § 220(1). AGS controls how Akal officers perform their work via its written employment policies (the employee handbook, the Fitness for Duty Policy, and the Minimum Standards for Employee Conduct and Qualifications for Duty), which specifically refer to Akal officers as part of the “AGS team” and cover numerous aspects of employment. Even beyond the employment policies’ terms, the AGS-Akal subcontract specifically provides that all AGS employment policies apply in whole to Akal officers.

Furthermore, AGS “possess[es] sufficient control over [Akal’s] employees’ essential terms and conditions of employment to permit meaningful collective-bargaining.” 362 NLRB No. 186, slip op. at 2. First, AGS retains control under the subcontract to reassign, at its sole discretion, an Akal officer, and furthermore to direct that Akal discharge any Akal officers whom

AGS deems unfit for duty. Second, AGS directly supervises Akal employees (in the complete absence of Akal supervisors) during the 12:00 a.m. to 8:00 a.m. shift Monday through Friday and all day on Saturday and Sunday. Third, the subcontract requires that all Akal employees' overtime must be approved by AGS. Fourth, under the subcontract AGS retains the ability to terminate the Akal subcontract "at its convenience."

2. Akal as Joint Employer

Under the facts recited above, I find that AGS's unarmed officers are *not* jointly employed by Akal. The record does not support a finding that Akal has a common-law employment relationship with AGS officers – that is, that AGS's officers are "employed to perform services in the affairs of [Akal] and who with respect to the physical conduct in the performance of the services is subject to [Akal's] control or right to control." *Restatement (Second) of Agency* § 220(1).⁹

Although the employment policies described above (the employee handbook, the Fitness for Duty Policy, and the Minimum Standards for Employee Conduct and Qualifications for Duty) carry the Akal as well as AGS logos, those policies are authored by AGS, they denominate Akal employees as part of the "AGS team," and by their terms and the terms of the subcontract subject Akal to all AGS policies. There is no converse instance of an Akal policy being applied to AGS employees.

As for the one instance in which Akal's Deputy Project Manager Devine signed discipline forms for two AGS employees, the record indicates that he did it only as a witness, at AGS's Trippany's request, and in furtherance of a discipline action determined by AGS. The

⁹ It is difficult to conceive of any situation where a prime contractor such as AGS would cede any control over its workforce to a subcontractor such as Akal. In fact, in circumstances such as this, there is no basis to conclude that AGS's officers are performing services in the affairs of Akal.

record reflects no other instance of Akal playing any role in disciplining AGS employees. As such, this single instance is insufficient to support a finding that Akal controls AGS employees' terms and conditions of employment.

Although some witnesses testified that during emergency "1010 incidents" Akal supervisors may direct AGS officers, I do not find that the vague testimony about these infrequent, exigent circumstances support a finding that Akal is a common-law employer of the AGS officers.

Although both AGS and Akal officers' uniforms carry the name of Akal as well as the logo and name of AGS, I do not find that this factor is sufficient to show a common-law employment relationship of Akal over AGS officers.

3. Multiemployer Unit

Because I find that the armed detention officers are jointly employed by Akal and AGS, and on the other hand, the unarmed detention officers are solely employed by AGS, the unit that Petitioner seeks to represent – both armed and unarmed officers – is a multiemployer unit under *Oakwood Care Center*, 343 NLRB 659 (2004). As such, it is only a statutorily permissible collective bargaining unit if all parties consent to bargain on that basis. *Id.* at 659.

Both AGS and Akal communicated in post-hearing submissions that they do not consent to multiemployer bargaining.¹⁰ Therefore, the petitioned-for unit is not permissible.

Accordingly, I hereby order that the petition in this matter be dismissed.

¹⁰ As stated above, AGS and Akal stipulated at the hearing that, should I find the detention officers are jointly employed by AGS and Akal, the petitioned-for unit of both armed and unarmed officers is an appropriate one. This stipulation, however, is not tantamount to consent to multiemployer bargaining, and is most appropriately construed as an acknowledgment that such a unit would be appropriate if both employers jointly employed the entire unit.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Intervenor is a labor organization within the meaning of Section 2(5) of the Act.
5. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

ORDER

It is hereby ordered that the petition is dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by November 20, 2015.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request

for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: November 6, 2015

/s/ Paul J. Murphy

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